

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD L. WETHERBY	:	ORDER
	:	DTA NO. 816667
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22 of	:	
the Tax Law for the Year 1989.	:	

Petitioner, Richard L. Wetherby, P.O. Box 755, Flagler Beach, Florida 32136-0755, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1989.

On September 4, 1998, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 24, 1998, the Division of Taxation, by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), submitted documents in support of dismissal. On October 2, 1998, petitioner, appearing *pro se*, submitted a letter, along with certain documentation, in response. After due consideration of the documents submitted, Brian L. Friedman, Administrative Law Judge, issues the following order.

ISSUE

Whether petitioner timely filed his petition following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, Richard L. Wetherby, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking review of a Notice of Disallowance of a claim for refund of personal income tax, dated March 27, 1995.

2. Following the conference held on March 19, 1998, the conciliation conferee issued a Conciliation Order (CMS No. 160289), dated May 15, 1998, which denied petitioner's request and sustained the Notice of Disallowance.

3. On August 17, 1998, the Division of Tax Appeals received the petition in this matter. The petition was sent by certified mail on August 14, 1998.

4. On September 4, 1998, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The notice stated:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on May 15, 1998 but the petition was not filed until August 14, 1998 or ninety-one days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this notice to submit written comments on the proposed dismissal.

5. In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division's mailing procedures with respect to conciliation orders; a copy of a certified mail record; and a copy of the conciliation order which denied petitioner's request for a refund of tax and sustained the statutory notice.

6. The affidavit of Thomas J. English, Assistant Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the certified mail record ("CMR") which is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. A BCMS clerk verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer or representative and then records on the CMR, under the heading "Certified No.," the certified control number from each envelope next to the appropriate name. Certified number Z257569588 was used for the conciliation order mailed to petitioner. The conciliation orders and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center.

7. According to Mr. English, each page of a CMR is a separate and individual certified mail record for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to affix his or her signature.

Mr. English states that the CMR for conciliation orders mailed on May 15, 1998 consisted of four individual pages; the conciliation order mailed to petitioner was listed on page one of the four-page CMR. He indicates that the copy of the CMR attached to his affidavit is a true and accurate copy of the original. The certified control numbers on the CMR run consecutively throughout the four pages, from Z257569583 through Z257569631. All of the names and

addresses listed on the CMR have been redacted except the entry for petitioner. Petitioner's name and address appears on page one of the CMR with the certified mail number Z257569588 appearing next to his name. There are 14 entries and 14 certified mail numbers on page one of the CMR; there were no deletions.

8. Each of the four pages of the CMR is date stamped May 15, 1998 by the Colonie Center branch of the U.S. Postal Service and each contains a postal employee's initials verifying receipt. At the bottom of page one, the page on which petitioner's certified number is listed, the number "14" has been entered as the "Total Number of Pieces Listed by Sender" and the number "14" has also been entered as the "Total Number of Pieces Received at Post Office."

9. Mr. English states that the Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record. Mr. English also indicates that these procedures were the normal and regular procedures of BCMS on May 15, 1998.

10. The affidavit of James Baisley, Chief Processing Clerk in the Division's Mail Processing Center, sets forth the procedures followed by the Mail Processing Center in delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR.

A member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. The postal employee affixes a postmark or his or her signature to the CMR to indicate receipt by the USPS. In this case, the postal employee affixed a postmark to

the CMR, wrote in the total number of pieces received (“14”) and initialed the CMR to indicate that 14 pieces were the total number of pieces received at the post office. Mr. Baisley’s knowledge that the postal employee wrote in the “Total Number of Pieces Received at Post Office” to indicate that 14 pieces were received is based upon the fact that the Division’s Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the CMR.

Mr. Baisley states that, in the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and is delivered to the originating office by a member of his staff. He further indicates that the regular procedures of the Mail Processing Center, concerning the mailing of certified mail, were followed in the mailing to petitioner on May 15, 1998.

11. In response to the Notice of Intent to Dismiss Petition, petitioner submitted a letter on October 2, 1998. He states that, based upon the Rules of Practice and Procedure sent to him by the Division of Tax Appeals, he thought that his mailing of the petition on August 14, 1998 was timely. He maintains that there were several national legal holidays which fell within the 90-day period. In addition, he states that due to wildfires, Florida was in a state of emergency for much of May, June and July and that Flagler County, the county of his residence, was under mandatory evacuation during part of July. Petitioner attached a copy of an Administrative Order of the Supreme Court of Florida, dated July 8, 1998, which, because of the wild fires, tolled all statutes of limitation for five days, *nunc pro tunc*, to July 2, 1998 for all proceedings in Flagler and Volusia Counties, Florida.

CONCLUSIONS OF LAW

A. In response to the denial, by the Division, of petitioner's claim for refund, petitioner requested a conciliation conference. As indicated in Finding of Fact "2", the conciliation conference was held on March 19, 1998 and a conciliation order was issued on May 15, 1998. Pursuant to Tax Law § 170(3-a)(e), the conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the order. A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where a taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Thomas J. English and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing, by certified mail, of conciliation orders. The affidavits generally describe the various stages of producing and mailing conciliation orders and attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing herein. The

documents establish that the general mailing procedures described in the English and Baisley affidavits were followed with respect to the conciliation order issued to petitioner. Petitioner's name and address appears on page one of the certified mail record which bears a USPS postmark of May 15, 1998 along with the initials of a postal service employee. There are 14 certified control numbers listed on page one and the USPS employee who initialed the certified mail record indicated that he received 14 items for mailing. The Division has, therefore, established that it mailed the conciliation order to petitioner by certified mail on May 15, 1998.

C. Petitioner's petition was mailed by certified mail to the Division of Tax Appeals on August 14, 1998 and is, therefore, deemed filed on the same date (*see*, 20 NYCRR 3000.22[c][2]), a date which is 91 days after the mailing of the conciliation order.

As to petitioner's contention that several legal holidays fell within the 90-day period, such contention must be rejected. It is only relevant, in computing specified periods of time, if a Sunday or holiday is the *last* day of such period (*see*, General Construction Law § 20), which was not the case in the present matter.

While there can be no doubt that the Florida wildfires caused serious disruptions to the lives of affected residents, it must be noted that petitioner has not even alleged that the wildfires prevented him from mailing his petition in August (he states that Flagler County was under mandatory evacuation during part of July). Even assuming *arguendo*, that such a natural disaster did impact upon petitioner's ability to timely file his petition, it must be noted that the 90-day period for filing the petition is absolute and there is no provision in the Tax Law for the waiver or extension of such period (*see*, ***Matter of Halperin v. Chu***, 138 AD2d 915, 526 NYS2d 660, 661-662, *lv denied and dismissed* 72 NY2d 938, 532 NYS2d 845; ***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

D. The petition of Richard L. Wetherby is dismissed with prejudice.

DATED: Troy, New York
December 10, 1998

/s/ Brian Friedman
ADMINISTRATIVE LAW JUDGE